Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SENIOR AIRMAN MATTHEW C. THOMPSON,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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Appellate Defense Counsel
Counsel of Record

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February 1998

23 pp

QUESTION PRESENTED

Whether Conviction of the Petitioner for sodomy for a private consensual act between the Petitioner and his wife is a violation of his Constitutional right to privacy.

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The petitioner, Senior Airman Matthew C. Thompson, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on December 16, 1997.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at *United States v. Thompson,* 47 M.J. 378 (1997), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals (No. ACM 31803, August 8, 1996) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on December 16, 1997. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259 (3) (West Supp. 1996) and 10 U.S.C.A. § 867(a) (West Supp. 1996).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution recognizes a right of privacy with respect to those rights regarded as "fundamental" or "implicit" in the concept of ordered liberty. *Roe v. Wade,* 410 U.S. 113 (1973). Although privacy is not a specifically enumerated right in the Constitutional Bill of Rights, the First Amendment has a "penumbra where privacy is protected from governmental intrusion." *Griswold v. Connecticut,* 381 U.S. 479, 483 (1965).

STATEMENT OF THE CASE

Procedural History:

On 10–13 July 1995, the Petitioner was convicted by a general court-martial. Petitioner was charged with attempted murder of his wife in violation Article 80, U.C.M.J., 10 U.S.C. § 880, two specifications of assault on his wife in violation of Article 128, U.C.M.J., 10 U.S.C. § 928, one specification of consensual sodomy with his wife in violation of Article 125, U.C.M.J, 10 U.S.C. § 925, one specification of communicating a threat in violation of Article 134, U.C.M.J., 10 U.S.C. § 934, and one specification of a failure to obey a lawful order in violation of Article 92, U.C.M.J., 10 U.S.C. § 892.

One specification of assault and the Charge of failing to obey the order were dismissed. The Petitioner was convicted, contrary to his pleas, of the remaining charges and specifications. He was found not guilty of attempted murder but was found guilty of the lesser-included offense of aggravated assault.

The petitioner was sentenced to a Bad Conduct Discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to Airman Basic. The convening authority approved the sentence as adjudged on September 12, 1995. On August 8, 1996 the Air Force Court of Criminal Appeals affirmed the findings and sentence. Appendix B. On December 16, 1997, the United States Court of Appeals for the Armed Forces affirmed the decision of the lower military court. Appendix A.

Statement of Facts:

The Petitioner and his wife were married during their assignment in Germany in 1993. The Petitioner's wife had a daughter prior to their marriage. The Petitioner's wife

testified against her husband, the Petitioner, about the March 19, 1995 incident. (TR. 90–137).

She said that she and her husband went socializing at friends' homes that afternoon and evening and that her husband drank heavily during the course of that time. She said that she left the party at about 2100 hours (9:00 p.m.) and took her daughter home but that the Petitioner stayed. She explained that he returned home late and woke her up "real gentle like" and that he was feeling amorous. (TR. 103). She said she told him she was not interested in engaging in sex. She said he left the room temporarily but returned and got the pistol the two kept in their bedroom. (TR. 103). She said he wanted to talk about her adultery but that she refused. (TR. 107). She claimed they argued, he became increasingly angry and he eventually pushed her to the floor and straddled her. (TR. 109). She said that as they argued, he would not let her leave the room in spite of her best efforts, and hit her with his hands and the gun multiple times (TR. 109) and kicked her once. (TR. 110). This was the basis of Charge II. She said that this argument lasted "probably about an hour" when she finally admitted to him that she had been committing adultery. (TR. 111). She said he then became even angrier and pointed the gun at her forehead. (TR. 111–112). This was the basis of Charge I. She said she then decided to calm her husband down by unzipping and pulling down his pants and performing oral sex on him. (TR. 114). She explained that he initially refused but eventually succumbed to her ministrations. (TR. 129–130). Afterwards, she said, they both took a shower. (TR. 115). The Petitioner then called a friend who came by for a short visit but stayed only a half-hour or so. (TR. 116). They went to bed, he fell asleep and she then left the house. (TR. 118).

REASON FOR GRANTING THE WRIT

CONVICTION OF THE APPELLANT FOR SODOMY FOR A PRIVATE CONSENSUAL ACT BETWEEN THE APPELLANT AND HIS WIFE IS A VIOLATION OF THE APPELLANT'S CONSTITUTIONAL RIGHT TO PRIVACY.

As discussed above, the Petitioner's wife, an active duty military member, initiated the act of sodomy upon her husband. He initially resisted but eventually succumbed to her ministrations and allowed her to commit sodomy upon him. (TR. 114, 129–130). This was done in the privacy of their marital bedroom (at the conclusion of the argument that gave rise to the assault charges). The act was not charged as a forcible sodomy.[1] Although the military judge clearly found this charge to be of questionable judgment, he overruled the defense motion to find the charge failed to state an offense. (App. Ex. II, III, R 21–26, 31).

This Honorable Court has found that privacy is a right protected by the "penumbra" of the Bill of Rights and that marriage is a "relationship lying within th[is] zone of privacy." *Griswold v. Connecticut,* 381 U.S. 479 (1965) (overturning a state law prohibiting use of contraceptives by married couples). The Supreme Court did address the issue of whether homosexual sodomy is protected by the Constitutional right to privacy and found that it is not. This Court found "no connection between family, marriage, or procreation on the one hand and homosexual activity on the other." *Bowers v. Hardwick,* 478 U.S. 186, 191 (1986). However, the Court limited its holding to homosexual

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[1]Trial counsel conceded that the act was not forcible sodomy (TR. 24). The appellant does note, however, that trial counsel did seem to be arguing some form of forcible sodomy at several points during the record. *See e.g.,* TR. 200, 215.

activity. The Court refused to rule on the question of adult consensual heterosexual activity—let alone activity within marriage. *Bowers v. Hardwick*, 478 U.S. at 188 n2. As Justice Stevens, joined by Justices Brennan and Marshall in dissent, asserted "[t]he essential 'liberty' that animated the development of cases like *Griswold, Eisenstadt*,[2] and *Carey*[3] surely embraces the right to engage in [marital] nonreproductive, sexual conduct . . . our prior cases thus establish that a State may not prohibit sodomy within 'the sacred precincts of marital bedrooms.'" *Id.*

In affirming the petitioner's conviction, the United States Court of Appeals for the Armed Forces relied on the fact that this consensual act of sodomy occurred at the end of a brutal beating. That court held:

> The extent to which the constitutional right to privacy prohibits a prosecution for sexual relations within a marital relationship raises important constitutional questions. Any such constitutional right, however, must bear a reasonable relationship to activity that is in furtherance of or supportive of the interests of the marital relationship. Those interests are not at issue in circumstances where, as in this case, the husband is engages in a brutal beating of his wife. *See generally* Mil.R.Evid. 504(c)(2)(A), Manual for Courts-Martial, United States (1995 ed.) (privilege or confidential marital communications does not exist "[i]n proceedings in which one spouse is charged with a crime against the person...of the other spouse...."). Under the circumstances of this case, appellant is in no position to claim the protection of a constitutional

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[2]*Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[3]*Carey v. Population Serv. Intl.*, 431 U.S. 678 (1977).

> right that is intended to protect the interest of the marital relationship.

Thompson, 47 M.J. at 379. While it is true that the act of sodomy case at the end of a brutal beating, the lower court failed to realize that the act of sodomy was consensual and actually contributed to marital harmony. The Petitioner's wife initiated the act of sodomy. This act was consensual and was successful in stopping the beating. Petitioner was charged and convicted for the various assaults. He does not challenge those convictions here. But the act of sodomy was consensual and in furtherance of the marital relationship. It is this conviction that violates his constitutional right of privacy.

Griswold's right to privacy recognized the unique bond of the marital relationship, and has been extended to unmarried persons only in limited circumstances. *Compare Eisenstadt v. Baird,* 405 U.S. 438, 453 (1971) (right to use contraceptives extends to unmarried couples), *with Bowers v. Hardwick,* 478 U.S. 186, 191 (1986) (no constitutional right to engage in homosexual sodomy). It has specifically been limited in the military. *United States v. Gates,* 40 M.J. 354 (C.M.A. 1994) (conviction upheld for "consensual, noncommercial, heterosexual fellatio that is performed in private between two *unmarried* adults."). The crux of the *Griswold* decision is that government has no legitimate interest in regulating private, consensual sexual activity between a husband and wife.

The Petitioner was convicted for engaging in private, noncommercial, consensual oral sodomy with his wife. This intimate behavior falls squarely within this Honorable Court's recognition that "the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh v. American College of Obstetricians & Gynecologists,* 476 U.S. 747, 772

(1986). The lower court's decision invades the Petitioner's constitutional right of privacy.

CONCLUSION

The Petitioner's constitutional right of privacy has been invaded by his conviction for his private, consensual, noncommercial act of oral sodomy with his wife. This is contrary to prior rulings of this Honorable Court and thus, must not stand.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 1998

APPENDIX A

UNITED STATES, Appellee

v.

Matthew C. THOMPSON, Senior Airman
U.S. Air Force, Appellant

No. 96–1412

Crim. App. No. 31803

United States Court of Appeals for the Armed Forces

Argued November 6, 1997

Decided December 16, 1997

Counsel

For Appellant: *Captain W. Craig Mullen* (argued); *Colonel Douglas H. Kohrt* (on brief); *Colonel David W. Madsen* and *Major Ormond R. Fodrea.*

For Appellee: *Captain Steven D. Dubriske* (argued); *Colonel Brenda J. Hollis* and *Lieutenant Colonel Michael J. Breslin* (on brief).

Military Judge: Terence A. Curtin

PER CURIAM:

Contrary to his pleas, appellant was convicted by a general court-martial of officer and enlisted members of assault, aggravated assault, and sodomy, in violation of Articles 128(a), 128(b), and 125, Uniform Code of Military Justice, 10 USC §§ 928(a), 928(b), and 925, respectively. Appellant was sentenced to a bad-conduct discharge, confinement for 30 months, total forfeitures, and reduction to

the lowest enlisted grade. The convening authority approved these results, and the Court of Criminal Appeals affirmed in an unpublished opinion.

This Court granted review of the following issue:

> WHETHER CONVICTION OF APPELLANT FOR SODOMY FOR A PRIVATE, CONSENSUAL ACT BETWEEN APPELLANT AND HIS WIFE IS A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO PRIVACY.

In addition, we specified the following issue:

> WHETHER IT WAS PREJUDICIAL ERROR FOR THE MILITARY JUDGE TO ENTER THE CLOSED DELIBERATIVE SESSION.

DISCUSSION OF THE GRANTED ISSUE

Appellant was convicted of assault and aggravated assault arising out of an attack on his wife. In the course of the beating, appellant held a 9 mm handgun against his wife's forehead and attempted to fire it. The weapon, although loaded, did not discharge. As appellant was loading a second clip in the gun, his wife attempted to divert his attention by engaging him in an act of sodomy. This act formed the basis of the sodomy charge against appellant. Appellant asserts that is sodomy conviction represents an "intrusion . . . into the sanctity of the marital relationship [which] violates guarantees of privacy found in the penumbra of the Bill of Rights." Final Brief at 6.

The extent to which the constitutional right to privacy prohibits a prosecution for sexual relations within a marital relationship raises important constitutional questions. Any such constitutional right, however, must bear a reasonable relationship to activity that is in furtherance of or supportive of the interests of the marital relationship. Those interests are

not at issue in circumstances where, as in this case, the husband is engaged in a brutal beating of his wife. *See generally* Mil.R.Evid. 504(c)(2)(A), Manual for Courts-Martial, United States (1995 ed.) (privilege for confidential marital communications does not exist "[i]n proceedings in which one spouse is charged with a crime against the person . . . of the other spouse. . . ."). Under the circumstances of this case, appellant is in no position to claim the protection of a constitutional right that is intended to protect the interests of the marital relationship.

DISCUSSION OF THE SPECIFIED ISSUE

During the deliberation of the members on findings, the members advised the military judge that they had questions about the findings worksheet. The military judge, accompanied by the court reporter, entered the deliberation room without counsel or appellant and answered the members' questions. We agree with the Court of Criminal Appeals that it was error for the military judge to enter the closed session and conduct proceedings without appellant or counsel. *Unpub. op.* at 5; *see* Art. 39(b), UCMJ, 10 USC § 839(b); *United States v. Allbee,* 5 USCMA 448, 450, 18 CMR 72, 74 (1955) (error when law officer entered closed session to pass on form of proposed sentence).

Because this error was neither constitutional nor jurisdictional, we test it for prejudice under Article 59(a), UCMJ, 10 USC § 859(a). Under the specific circumstances of this case, we agree with the conclusion of the Court of Criminal Appeals that appellant is not entitled to relief because his substantial rights were not materially prejudiced by the error.

As we noted in *Allbee,* violation of Article 39(b) creates a "rebuttable presumption . . . [of] prejudice" against the

Government. 5 USCMA at 452, 18 CMR at 76. At the outset of our analysis, we note that the military judge took the court reporter into the closed session and made a verbatim transcript, which then was provided to the parties at trial. As a result, we have a record of the session at the appellate level and can review this case for prejudice. *Compare United States v. Martinez,* 40 MJ 82, 84 (CMA 1994).

Our review of the transcript shows that the questions asked by the members concerned only the form of the findings worksheet and not the substance of the deliberations. The members already had reached their decisions as to the findings, and they simply inquired how to enter the lesser-included offenses onto the worksheet. Nothing was said in the closed session that would have been objectionable if it had been said in an open session. All of the answers given by the military judge would have been appropriate had they been stated in an open session. Appellant has not identified any prejudice. Neither trial nor appellate defense counsel has identified any matter that appellant would have either challenged or sought to clarify had it been stated in an open session. Under these circumstances, we find that the Government has rebutted the presumption of prejudice, and appellant is not entitled to relief.

CONCLUSION

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

APPENDIX B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MATTHEW C. THOMPSON,
FR466–59–6943
United States Air Force

ACM 31803

8 August 1996

Sentence adjudged 13 July 1995 by GCM convened at Dyess Air Force Base, Texas. Military Judge: Terence A. Curtin

Approved sentence: Bad-conduct discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to E–1.

Appellate Counsel for Appellant: Colonel Jay L. Cohen and Major Ormond R. Fodrea

Appellate Counsel for the United States: Colonel Jeffery T. Infelise, Lieutenant Colonel Michael J. Breslin, and Captain R. Scott Howard.

Before

HEIMBURG, GAMBOA, and SENANDER
Appellate Military Judges

OPINION OF THE COURT

SENANDER, Judge:

The appellant was convicted, contrary to his pleas, by a court-martial composed of officer and enlisted members, of sodomy, aggravated assault, and assault and battery. Articles 125 and 128, UCMJ, 10 U.S.C. §§ 925, 928 (1994). His approved sentence is a bad-conduct discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to E–1. The appellant asserts violation of his constitutional right to privacy by his conviction of consensual sodomy with his wife. He also asserts multiplicity, unresolved conflict with counsel, and deprivation of his right to a public trial when the military judge entered the members' closed deliberations. We find error, but no prejudice, and affirm.

BACKGROUND

The appellant and his wife of three years, an active duty senior airman, socialized with friends during the late afternoon and evening of March 18, 1995. During the course of the evening, the appellant became intoxicated. While at their friend's house, the appellant invited his wife to join him in their car, where he questioned her repeatedly about her rumored infidelity. She denied that she had been unfaithful, and appellant returned to his friend's house. Another confrontation occurred in the friend's house. The appellant's wife went home without appellant.

When the appellant returned home, his wife was sleeping. He attempted to interest her in intercourse, but she told him that she was tired and not feeling well. He left the room, but returned later, turned on the light and found his 9 mm pistol. The appellant's wife thought she heard him "put a clip in the gun and cock the hammer." He again questioned her about rumors of her infidelity, while the pistol lay on the bed between them. After repeated questioning, she went to the

bathroom. He followed her into the bathroom and pushed her against the latrine and to the floor as she tried to leave the bathroom.

She returned to the bed and sat on the side, as appellant continued to question her about her rumored infidelity, which she denied. He became angrier and pushed her to the floor. The appellant jumped on top of her back while she was on her hands and knees. He then repeatedly hit her about the head, arms and back with his hands and the pistol, which he had in his right hand. She tried to leave the bedroom when he got up, but appellant pushed her over and sat on top of her. He pinned her torso and arms to the floor. The questioning and intermittent hitting continued for what appellant's wife described as "about an hour." While still pinned to the floor, she admitted to one incident of adultery and appellant became enraged. He pushed the 9 mm pistol against her forehead and, based on what his wife heard, pulled the trigger. The pistol did not fire because the mechanism would not work when it was pushed tightly against her forehead. She heard a clicking sound and the appellant saying "Damn, something is wrong with the gun."

He reached over to get another clip and started working on the pistol. While he worked, his wife was able to free her arms. In an attempt to distract the appellant, she unzipped his pants ant took his penis out. The appellant's wife testified that the appellant asked, "What are you doing?" and she told him, "Just let me do this. I want to do this." The appellant responded, "I don't want you to do that." Despite his protest, appellant's wife performed fellatio on him. Her effort to distract him worked and he suggested they both take a shower. The appellant then called a female acquaintance while his wife fixed her hair. The appellant's friend came over and talked for about 30 minutes. After the friend left, the appellant fell asleep and his wife took their daughter and went for help.

SODOMY

The appellant asserts that his conviction for the offense of sodomy with his wife is a violation of his constitutional right to privacy. The standard of review for a fundamental personal liberty such as the constitutional right to privacy is a *de novo* review by the Court. *Jacobellis v. Ohio,* 378 U.S. 184, 190 (1964).

Article 125, UCMJ, prohibits unnatural carnal copulation with another person of the same or opposite sex. There is no exception provided for married couples. The appellant asserts case law only addresses heterosexual fellatio that is performed, in private, between two unmarried adults. *See United States v. Gates,* 40 M.J. 354 (C.M.A. 1994); *United States v. Henderson,* 34 M.J. 174 (C.M.A. 1992); *United States v. Fagg,* 34 M.J. 179 (C.M.A. 1992), *cert. denied,* 506 U.S. 829, 113 S.Ct. 92 (1992). He asks us to distinguish this case because the act of sodomy occurred between married adults. We decline to do so.

We certainly can question the wisdom of charging this consensual sodomy offense, initiated by the appellant's wife to distract him, along with the extremely serious assault charges. However, we decline to conclude that the appellant had an overriding constitutional right to privacy, based on his marital status, while he was engaged in a brutal beating of his wife. This error is rejected.

MULTIPLICITY

The appellant next asserts that the aggravated assault and the assault and battery are multiplicious because they arise from the same incident. The appellant was charged with a violation of Article 80, UCMJ, and convicted of the lesser included offense of aggravated assault, by placing the pistol against his wife's forehead and pulling the trigger. In addition,

he was charged with aggravated assault by striking his wife with the pistol, but was convicted of the lesser included offense of assault and battery.

In *United States v. Teters,* 37 M.J. 370 (C.M.A. 1993), cert. denied, — U.S. — 114 S.Ct. 919 (1994), the Court of Appeals for the Armed Forces returned to the congressional intent/elements test for determining the multiplicity of charges. *See Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). The threshold test of the *Teters/Blockburger* analysis is whether the specifications arose out of the same act or course of conduct. *United States v. Neblock,* 40 M.J. 747 (A.F.C.M.R. 1994), *pet. denied,* 42 M.J. 96 (1995). Clearly, placing a loaded firearm against his wife's forehead and pulling the trigger is a different act than hitting her with his hands and the firearm. We do not find these charges multiplicious. In addition, we note the appellant failed to object to the charging of these offenses as multiplicious and thereby forfeited the issue. *United States v. Lloyd,* 43 M.J. 886 (A.F.Ct.Crim.App. 1995).

CONFLICT WITH COUNSEL

The appellant expressed dissatisfaction with his attorneys at the end of his prepared unsworn statement. He stated in part: ". . .there were certain things that was left out of evidence that could have been presented to you guys, but it wasn't. They considered it to hurt my case. I didn't. I've not been represented from day one. I was almost pressured into signing a pretrial agreement."

On appeal, appellant does not allege ineffectiveness of trial defense counsel. The thrust of his assertion of error is that the military judge failed to resolve on the record that the accused was satisfied with his defense team. Following a defense-requested recess, the circuit defense counsel stated on

the record: " We have talked with our client. He does wish for myself and Captain [F] to continue to represent him in this trial and the post-trial matters as well." The military judge made no inquiry as to appellant's desires.

This is not a case of conflict of interest where a defense attorney represents another accused in the same matter. *United Stated v. Henry,* 42 M.J. 231 (1995). Here we have an appellant who is dissatisfied with the result of his trial and vents his frustration concerning the performance of his counsel to the court members. When defense counsel learned of appellant's dissatisfaction, they asked for a recess and determined if the client wanted to discharge his defense team or was merely making an allegation out of frustration. The defense counsel made that determination after consulting with the appellant and notified the military judge. The military judge should have asked the appellant if he was satisfied with his counsel, but we conclude from his actions that appellant concurred in his counsel's assertion that the conflict had been resolved.

We note that the appellant demonstrated during voir dire and the unsworn statement presentation that he was an active participant who was not intimidated by the courtroom setting. When defense counsel peremptorily challenged a member, the military judge asked the appellant if he concurred and the appellant said "no." After discussion between appellant and his counsel, the challenge was withdrawn. The appellant again demonstrated his active participation when he threw down the prepared unsworn statement and told the court members what he wanted them to know about the case, including his dissatisfaction with counsel. Only moments after the circuit defense counsel told the military judge that the appellant wished to retain both defense counsel, counsel advised the military judge that appellant wanted counsel to argue for a

punitive discharge. The military judge addressed the appellant, who unequivocally agreed to have his counsel argue for a punitive discharge.

We are, therefore, convinced the appellant would not have sat silently if he had disagreed with his defense counsel's assertion that their conflict had been resolved. The appellant would certainly have commented if he did not want his counsel to proceed with defending him. At this point in the trial the sentencing argument was all that was left for defense counsel to do, and the appellant concurred in the most significant portion of that by telling the military judge that he wanted his counsel to argue for a punitive discharge. If the appellant were not satisfied with his defense counsel, he would not have told the military judge that he wanted them to argue for a punitive discharge. Although we find the military judge erred, we find no prejudice to appellant under the circumstances of this case.

DELIBERATION

The appellant asserts the military judge erred by conferring with the court members during findings deliberations outside the presence of counsel and the accused. The members had questions concerning the findings worksheet which the military judge determined could not be resolved in open court. The military judge and the court reporter entered the deliberation room without counsel or the appellant and the judge answered questions concerning how to reflect the member's findings on the findings worksheet. Article 39(b), UCMJ, 10 U.S.C. § 839(b) (1994), prohibits any consultation in the presence of the court members without the presence of the military judge, all counsel, and the accused. Violation of this prohibition creates a rebuttable presumption of prejudice. *United States v. Allbee,* 5 U.S.C.M.A. 448, 18 C.M. R. 72 (1955).

Here, the military judge erred by entering into a closed session without the appellant and counsel being present. However, we conclude appellant suffered no harm and the presumption of prejudice is rebutted. The military judge questioned the president in open court, on the record, in front of the appellant and counsel for both sides. The president confirmed the military judge was in the closed deliberation session merely to assist in putting the findings they had already reached onto the worksheet. All the discussion between the members and the military judge was recorded verbatim. Trial defense counsel moved for a mistrial before the members returned a sentence, based on the closed session. The military judge directed the reporter to prepare and give defense counsel and appellant a verbatim record of the closed session meeting before completion of the trial. The trial defense counsel read the verbatim transcript and renewed his motion for a mistrial without citing specific prejudice to the appellant. Under the circumstances, we find the military judge's presence did not prejudice the appellant.

We conclude the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings of guilt and the sentence are

AFFIRMED.

Senior Judge HEIMBURG and Judge GAMBOA concur.

OFFICIAL

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Staff Sergeant, USAF
Chief Court Administrator